

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAWN M. KUHN

Claimant

VS.

AT & T COMMUNICATIONS, INC.

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. **1,034,327**

ORDER

Claimant requests review of the May 25, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant alleged injury to her back, neck and shoulders from working mandatory overtime coupled with using a workstation that was broken and could not be properly adjusted for height.

The Administrative Law Judge (ALJ) found claimant failed to sustain her burden of proof that her injuries arose out of and in the course of employment with the respondent. The ALJ noted a physician assistant's letter attributed claimant's condition to a car accident in 2003.

The claimant requests review of whether she met her burden of proof to establish she suffered a personal injury arising out of and in the course of her employment. Claimant denies she was involved in a 2003 car accident and that she had recovered from a 2001 car accident. Claimant argues that her increased work activity as a result of mandatory overtime caused the pain symptoms in her back, neck and shoulders.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Dawn Kuhn became employed as a customer service representative for the respondent on March 29, 1999. Her job duties included wearing a head set to answer telephone calls for setting up different phone services such as cell, DSL and satellite TV for customers using the telephone and computer. The work stations were ergonomically designed but claimant alleged that at times her desk was broken and could not be adjusted to different heights.

Claimant testified she was required to work mandatory overtime in 2003 and this is when she started having problems with her back, neck and shoulders. Claimant sought treatment with her family physician, Dr. Jay Michael Patton. In July or August 2004, claimant received some physical therapy and missed work. She advised Beth Geary, respondent's attendance manager, that she was not able to handle the prolonged sitting due to pain in her neck and back.

Claimant testified she was able to return to work after having physical therapy. In late 2005 Cindy Dolan authorized an accommodated job (no overtime) for the claimant which lasted a month and then claimant returned to her regular hours.

Thereafter, claimant apparently took leave under the Family Medical Leave Act on numerous occasions as a result of her back pain. The last time was in June 2006 but when that period of leave was exhausted in September 2006 the claimant did not feel she was able to return to work and her employment was terminated. Claimant continued to receive medical treatment from her personal physician and finally filed an application for hearing on April 20, 2007.

Extensive medical records from claimant's personal physician, Dr. Patton were offered as an exhibit at the preliminary hearing. And the records detail a diagnosis of chronic back pain and the conservative treatment measures the doctor provided claimant. And the doctor's records further detail that he restricted claimant from working overtime.

Conversely, in a June 16, 2006, letter apparently written so claimant could take leave under the Family Medical Leave Act, Dr. Patton's physician's assistant, LeAnn True wrote that claimant has chronic right upper back and neck pain from an injury that initially occurred in 2003 after a motor vehicle accident where claimant had severe whiplash. Moreover, a report from Dr. Saad M. Al-Shathir likewise noted claimant had chronic upper back/neck pain since 2003 and noted there were no documented new events.

The difficulty with claimant's version of events is that she would frequently avail herself of leave under the Family Medical Leave Act and did not request workers

compensation benefits of medical treatment and/or temporary total disability compensation from respondent. It was not until she had exhausted her leave and had been terminated that she finally asserted that she had a work-related injury. And claimant's doctor's physician's assistant attributed her condition to an automobile accident.

Whether the accident occurred in 2001 or 2003 the medical causation evidence regarding claimant's condition when she left work in June 2006 attributed her condition to an automobile accident. And the ALJ believed that evidence over the claimant's testimony. Some deference may be given to the ALJ's findings and conclusions because he was better able to judge the claimant's credibility by personally observing her testify.

Based upon the record compiled to date this Board Member agrees with the ALJ's determination that claimant has failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 25, 2007, is affirmed.

IT IS SO ORDERED.

Dated this 17th day of August 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

¹ K.S.A. 44-534a.

² K.S.A. 2006 Supp. 44-555c(k).